Television Programming Comparison

Media Agreements 2006-07

Football	Distribution	# of Games
ABC Sports	National/Regional	17
ESPN/ESPN2	National	23
ESPN Plus	Syndication	18
ESPN Other ("U", 360)	Emerging	10
TOTAL		**68**

Men's Basketball	Distribution	# of Games
CBS Sports	National/Regional	11
ESPN/ESPN2	National	25
ESPN Plus	Syndication	100
ESPN Other ("U", 360)	Emerging	10
TOTAL		**146**

Women's Basketball	Distribution	# of Games
CBS Sports	National/Regional	2
ESPN/ESPN2	National	5
Comcast Chicago	Regional	23
TOTAL		**30**

Women's Volleyball	Distribution	# of Matches
ESPN/ESPN2	National	3
Comcast Chicago	Regional	7
TOTAL		**10**

Olympic Sports		~25 (50 hrs)
TOTAL		**279**

Media Agreements 2007-08

Football	Distribution	# of Games
ABC Sports	National (w/ESPN outer market)	17
ESPN/ESPN2	National	24
Big Ten Network	National	35
TOTAL		**76**

Men's Basketball	Distribution	# of Games
CBS Sports	National/Regional	15
ESPN/ESPN2	National	43
Big Ten Network	National	105
ESPN Other ("U", 360)	Emerging	13
TOTAL		**176**

Women's Basketball	Distribution	# of Games
CBS Sports	National/Regional	2
ESPN/ESPN2	National	5
Big Ten Network	National	55
TOTAL		**62**

Women's Volleyball	Distribution	# of Matches
ESPN/ESPN2	National	3
Big Ten Network	National	20
TOTAL		**23**

Olympic Sports		170
TOTAL		**507**

The Midwest is Big Ten country.
And the Big Ten Network is where it lives.

FACT – BIG TEN NETWORK IS BREAKING NEW GROUND

- **Big Ten Network is a network by, for and about the Big Ten community and sports fans nationwide.**
- **This year alone, the network will air 41 Big Ten football games, 140 Big Ten men's basketball games and 55 Big Ten women's basketball games – all more than any other network.**
- **Big Ten Network will air more than 1,000 hours of original programming in high-definition, more than any new network in television history.**
- **Big Ten Network has strong regional appeal in the eight-state region its schools call home, and fans everywhere else want to follow their Big Ten teams no matter where they live.**
- **Big Ten Network reflects the Midwestern values of the Conference's member institutions: Great sports, great academics and a great way of life.**
- **The Big Ten Network will become integrated into each university's curriculum and will empower every student, faculty, alumni and fan to extend the heartland values, campus tradition and scholastic achievement that marks each of the universities and the diverse communities that support them.**

FACT – BIG TEN NETWORK SHOULD BE ON EXPANDED BASIC IN BIG TEN COUNTRY

- **The overwhelming integration of Big Ten universities and their teams into the fabric of their states warrants widespread distribution of the Big Ten Network.**
- **If you live in the eight-state region that is Big Ten Country and currently receive 70 channels as part of your basic service, very few are local in origin, and Big Ten Network should be one of them.**
- **Consumers are given no choice regarding which 70 channels they receive. If grandparents have to pay for MTV and VH1, singles pay for the Disney Channel and Nickelodeon, and men pay for Oxygen, Lifetime and WE, shouldn't people in the Midwest receive Big Ten Network?**
- **Cable operators carry the regional sports networks they own on expanded basic.**

- **Big Ten Network has broad appeal regionally and nationally and will air over 400 live events along with more than 600 hours of programming featuring academic, artistic and other on-campus activities emphasizing their shared commitment to excellence.**
- **In 2006, more than half of the top 100 highest-rated programs on cable television were sporting events. Sports programming generates audiences like no other single programming genre. And Big Ten sports generate more passion than just about any other conference.**

FACT – THE BIG TEN NETWORK IS WORTH THE PRICE

- **Big Ten Network has national agreements with DIRECTV, Dish Network and AT&T's U-Verse service, as well as agreements with over 140 cable providers within the eight states, including Insight Communications, WideOpenWest, RCN, Buckeye CableSystem and others. These agreements indicate that our price is fair and our content compelling.**
- **The network's rate specific to the Midwest is a third of what Comcast typically charges for its own sports networks, and the cost to operators everywhere else is less than at least 65 other national networks.**
- **The Big Ten Network offers a 24-hour standard and high-definition channel, a dynamic video-on-demand programming service and a rich broadband video package for high-speed Internet customers. Many programmers charge extra for these services, but Big Ten Network is including them in the cost to cable operators which will help <u>them</u> generate revenue.**

###

Big Ten Network Q&A

Q: What is the Big Ten Network?

A: The Big Ten Network is an exciting new television network that the Big Ten Conference launched August 30, 2007 to nationally promote a wide array of Big Ten sports and academic programming, 24 hours per day, 365 days per year.

Q: What is on the Big Ten Network?

A: The following programming is on the Big Ten Network and/or alternative Big Ten Network platforms:

- 39 football games this season
- 140 regular-season men's basketball games
- 55 regular-season women's basketball games
- Big Ten championship events
- Archived Big Ten events, including bowl games
- 170 Olympic sporting events
- Coaches' shows
- 660 hours of campus programming
- More high definition programming than any new television network in history
- An average of 70 events yearly per school

Q: Do I have to pay more for the Big Ten Network?

A: We believe that if you live within the eight states of the Big Ten footprint, you should not have to pay any more to receive the network, which is why we are asking for the network to be carried on expanded basic cable. If you already get 50 to 60 channels as part of your basic cable/satellite package, we feel that the Big Ten Network should be part of that lineup. It's hard to imagine finding more than 50 channels more important to a viewer within the Big Ten community than the Big Ten Network.

Outside of the eight-state region, you may be required to subscribe to a digital level of service, which could include many other channels in addition to the Big Ten Network.

Q: I want the Big Ten Network, but my cable company is not providing it. What can I do?

A: The most important thing you can do is tell your cable provider that you want the Big Ten Network on basic cable and recruit your friends to do the same. Call 1-866-WANT-B10 to record a message or patch through directly to cable companies. Tell them you want the Big Ten Network on expanded basic cable.

We also have national agreements in place with DIRECTV, DISH Network and AT&T U-Verse as well about 120 smaller cable operators. Go to the front page of BigTenNetwork.com and enter your zip code to find a Big Ten Network provider in your area.

Q: Are you going to make a deal with Comcast?

A: It is highly unlikely that Comcast will decide to carry the Big Ten Network in the near future. Comcast customers should consider making alternative plans to view all of the football and basketball games scheduled to appear on the network. The Big Ten Network is having productive conversations with the majority of cable providers, but Comcast is unwilling to negotiate a deal at this time. The network is carried by DIRECTV, DISH Network, AT&T U-Verse, Insight Communications (including those not being absorbed by Comcast at the end of 2007) and about 120 cable operators across the Big Ten's eight-state footprint. Go to the front page of BigTenNetwork.com and enter your zip code to find a Big Ten Network provider in your area. You can call 1-866-WANT-B10 to let Comcast know your interest in receiving the network. But at this time, the network will not be carried by Comcast at launch.

Q: Are you going to make a deal with my cable or satellite operator?

A: The Big Ten Network has national agreements in place with DIRECTV, DISH Network, AT&T U-Verse as well as about 120 cable operators within the Big Ten footprint.

We are in productive negotiations with nearly every other cable operator with the notable exception of Comcast and Insight systems that will be absorbed by Comcast later this year.

The most important thing you can do right now is tell your cable provider that you want the Big Ten Network on basic cable and recruit your friends to do the same. Call 1-866-WANT-B10 to record a message or patch through directly to cable companies. Tell them you want the Big Ten Network on expanded basic cable.

Or, go to BigTenNetwork.com and enter your zip code to find a Big Ten Network provider in your area.

Q: As a DIRECTV customer, do I get the Big Ten Network?

A: Yes. Every DIRECTV customer gets the Big Ten Network on channel 220. The network is available as part of its Choice – or most basic – programming package. The satellite provider has also committed to carrying the network's overflow games so subscribers will have access to all Big Ten Network games when multiple games are being produced. Call your DIRECTV provider for more information.

Q. What's the situation with DIRECTV and their HD service?

A. DIRECTV has made a major investment in their HD service and while they are currently maxed out on their bandwith, they will have the capacity to air over 100 channels in HD when they flip the switch on their recently launched HD satellite. That is likely to take place in **mid-September**. Currently, viewers can tune to DIRECTV channel 499 to see if their systems are currently configured to receive the new HD channels.

One of their considerations was making sure they had overflow channels available for us and we now know their locations for the opening weekend's games - the Michigan-Appalachian State game will be on 220, and the other games are: Florida Intl. at Penn State - 221; Northeastern at Northwestern - 219; and Youngstown State at Ohio State – 218. In prime time, Bowling Green at Minnesota is on 220 and Indiana State at Indiana - 218.

Q: As a DISH Network customer, do I get the Big Ten Network?

A: Yes. DISH Network customers nationwide who subscribe to America's Top 100 and higher will find the Big Ten Network on Channel 439 through March 2008.

Additionally, the satellite provider has also committed to carrying the network's overflow games so subscribers will have access to all Big Ten Network games when multiple games are being produced. Call your DISH Network provider for more information.

Beginning in March 2008 for DISH customers **inside** the Big Ten's eight states, DISH Network will move the Big Ten Network from America's Top 100 (AT100) service to its America's Top 100 Plus service (AT100+) where all its regional sports networks are carried. That level of service is the equivalent to expanded basic cable.

Beginning in March 2008 for DISH customers **outside** the Big Ten's eight states, DISH Network will move the Big Ten Network from AT100 to a to-be-determined level of service.

This remains consistent with our stance that if you live within the Big Ten footprint, you should be able to receive the Big Ten Network on an expanded basic – or the equivalent – level of service. Outside of the Big Ten region, we are flexible on our carriage terms.

Q: How can fans outside of the eight-state region see the Big Ten Network?

A: All television distributors have been offered the Big Ten Network as an enhancement to their line-ups. If your cable provider is not picking up the Big Ten Network, you can call 1-866-WANT-B10 to let them know your interest in receiving the network.

You should know that we have significantly reduced the cost to cable operators to carry the network outside the Big Ten area, so we fully expect them to agree to do so. Even though the level of service cable/satellite providers may offer for the network may vary, we want to work with them so that if you're a fan who wants to order it, you'll be able to.

You can also call DIRECTV or DISH Network. Both have already reached an agreement with the network. To order DIRECTV, call 1-888-999-0422. To order DISH Network, call 1-800-333-DISH.

Q: Will the Big Ten Network carry the games I want to see?

A: The Big Ten Network will show more Big Ten football games and more Big Ten basketball games than any other network.

We will televise 39 football games in 2007 (36 in HD) and 140 men's basketball games this winter.

In the selection process for football, the Big Ten Network will be able to choose 2nd three times and 3rd three times during the 12-week season, so half the time the network will have either the second or third pick of games. Once ESPN and ESPN2 have selected their games, all remaining games will be produced and distributed by the Big Ten Network.

The Big Ten Network will televise 140 men's basketball games this winter, including 64 of the 99 in-conference match-ups.

The Big Ten Conference also has long-term agreements with ABC, ESPN and ESPN2. The Big Ten Network has a 20-year contract and will be the destination for more Big Ten coverage than any other network.

Q: Will the Big Ten Network broadcast in high-definition?

A: The Big Ten Network will produce more original HD than any other network in history. We plan to produce more than 350 events and our nightly live studio show in HD, which will total more than 1,000 hours of original high-definition (HD) content in our first year alone. If you do not have a high-definition television, you will still be able to receive all of our programming in standard definition.

Q: Isn't there a pre-existing business relationship with Big Ten Network and DIRECTV?

A: The Big Ten Network is owned in majority by the Big Ten Conference. A minority owner of the Big Ten Network is Fox Cable Networks. Fox Cable Networks is a subsidiary of NewsCorp, Inc. NewsCorp, Inc. is also a minority owner of DIRECTV, but is in the process of selling its stake in the satellite service to Liberty Media, LLC. The sale will not affect the Big Ten Network.

Additionally, it is important to note that the Big Ten Network has made a deal with DIRECTV's competitor, DISH Network.

Q: Why was the Big Ten Network created when we used to watch the games for free?

A: Big Ten fans have seen fewer games appear on their expanded basic cable packages in recent years. During the last two years, Big Ten teams have appeared on ESPNU and ESPN360 – two channels that the vast majority of fans do not receive – a combined 57 times.

Last year, eight Big Ten football games and a whopping 85 men's basketball games were not televised at all.

With the creation with the Big Ten Network, that will never happen again. Every home Big Ten football and men's basketball game will now be televised and the revenues are distributed directly to our schools.

Finally, with regard to previously syndicated games on ESPN-Plus, it is important to note that cable subscribers were actually paying for those games as part of their cable package.

To summarize, the Big Ten Network will ensure that every home Big Ten football and men's basketball game will be televised to national audience. Our stance is that fans within the Big Ten's eight-state footprint should be able to see these games at no additional charge on their existing expanded basic cable package.

Q: Isn't the Big Ten being "greedy?"

A: All fees and any other revenues from this venture will be shared equally among all 11 Big Ten institutions and the conference office. This increased financial support will help our schools to continue providing broad-based athletic programs, while enhancing the experience for all students on our campuses. For example, some schools are using the money to finance more scholarships, while others are building much-needed new facilities.

Q: Is the Big Ten Network the second-most expensive national network?

A: Contrary to published reports, the Big Ten Network is not the second-most expensive network in the country. The Big Ten Network's rate specific to the Midwest is two-thirds less than what the marketplace has determined is fair for Comcast to charge for its own regional networks, which incidentally are on expanded basic cable. In addition, the cost of the Big Ten Network to operators everywhere else is less than at least 65 other national networks – including ESPN, CNN, TBS, TNT, Lifetime, Oxygen, A&E and just about any other station that appears on your expanded basic cable package.

Q: Why should everyone pay for a "Big Ten tax?"

A: The Big Ten Network does not charge customers one penny. Cable and satellite companies pay to carry all cable networks, including the Big Ten Network. The decision whether to raise rates is made by your provider, not by the Big Ten or the Big Ten Network.

Additionally, the Big Ten Network will provide the cable companies with outstanding revenue opportunities through local advertising sales and the sale of high-definition packages and video-on-demand.

In all likelihood, the cable companies would actually profit from the carriage of the Big Ten Network. Contrary to what you many have heard or read, they do not have to pass the asking price to the consumer.

Q: If the cable companies stand to profit from the Big Ten Network, why are some not yet carrying it?

A: The cable companies want to put the Big Ten Network on a sports tier because they want to you to pay roughly $15-20 per month to receive digital service and then an additional $5-10 per month per subscriber.

The Big Ten Network does not want its fans to pay extra to follow their favorite teams. Additionally, no other sports tier channel televises locally relevant sports events.

Q: How will you handle multiple games at once? Which game will I get to see?

A: The Big Ten Network will sometimes air multiple games at the same time, and will regionalize the games so that we can cater to each specific market. You will see the games you care most about. So, for example, assuming the game is on the network, if you live in Michigan or West Lafayette, you could see the Boilers play the Wolverines on October 13. On that same day, if you live in Iowa or Illinois, you could see the Hawkeyes play the Illini.

We also will offer the games we are not broadcasting in certain markets to our distribution partners to air on their "overflow" channels, so that fans who live outside their university's state can watch their teams.

DIRECTV and DISH Network will carry all of our "overflow" games. For cable subscribers, the decision whether or not to air Big Ten Network "overflow" games will be made by their cable operator.

Q: Will ESPN GamePlan or ESPN Full Court still carry Big Ten games?

A: In years past, the only Big Ten games that appeared on ESPN GamePlan or ESPN Full Court were the regional ABC football games and the football and basketball games aired on ESPN Regional and ESPN Plus. Those regional ABC football games will now air on ESPN/ESPN2 out of market. The ESPN Regional/ESPN Plus basketball games will now be carried by the Big Ten Network.

Beginning in 2007, the only time a Big Ten ABC game might end up on GamePlan is in the rare instance that ABC is regionalizing a prime-time Big Ten game. There will be no Big Ten games on ESPN Full Court.

The Big Ten Network is making all of its games available to cable and satellite operators as part of their agreements to carry the network. Whenever the Big Ten Network is producing more than one game at a time, cable and satellite providers that have agreed to carry the Big Ten Network will be offered the chance to carry the additional games via "overflow" channels.

For example, let's assume that at noon ET one Saturday the Big Ten Network is producing two games (Penn State vs. Illinois and Michigan vs. Northwestern). If the Penn State-Illinois game is airing on the Big Ten Network, your cable or satellite system will be given the rights to carry the Michigan-Northwestern game on an "overflow" channel.

DIRECTV and DISH Network will air all of our "overflow" games. For cable operators, the decision whether or not to air Big Ten Network "overflow" games will be made by the cable operator.

Overall, the Big Ten Network will be producing significantly more football and men's basketball games than have aired regionally in recent years, and these games will be made available to all cable and satellite systems as part of their contracts to carry the Big Ten Network.

Q: Will the Big Ten Network stream games via the Internet?

We are working hard to create and execute a broadband video strategy that will compliment the high-quality programming found on our Network. Several factors will play a role in determining the breadth and depth of our broadband streaming offering, including rights issues and negotiations with cable and satellite providers. Keep an eye on www.BigTenNetwork.com for the latest information.

Q: Why is it necessary to create a new network?

A: Several years ago, when the Big Ten began a new round of television rights negotiations, ESPN expressed a desire to move some football games to Thursday nights. They also expressed no intentions of increasing their coverage of Big Ten women's sports.

The Big Ten did not want to move any of its football games to Thursday nights and also looked to substantially increase television exposure for its women's sports. That is how and when the idea of the Big Ten Network formed.

As a premier college athletic and academic conference, the Big Ten sees enormous opportunity to reach millions of Big Ten alumni and sports fans across the nation through this new national network. With the growing popularity of an increased number of sports and the incredible distribution of the Big Ten's more than four million alumni across the nation, the Big Ten feels an obligation to provide our fans with the most access to the most programming possible.

Q: Who owns the Big Ten Network?

A: The Big Ten Network is a joint venture between subsidiaries of the Big Ten Conference and Fox Cable Networks. Fox has a proven track record of successfully launching other channels, which we believe will be a big factor in the successful launch of the Big Ten Network.

Q: Where can I apply for a job with the Network?

A: Click here for more information on jobs and internships at the Big Ten Network.

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Wisconsin Manufacturers' Association • 1911
Wisconsin Council of Safety • 1923
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To: Chairperson Phil Montgomery
Members of the Assembly Committee on Energy and Utilities
From: R.J. Pirlot, Director of Legislative Relations
Date: January 22, 2008
Subject: **Oppose Assembly Bill 604.**

Wisconsin Manufacturers and Commerce (WMC) is the largest representative of Wisconsin employers. Our membership is a broad cross-section of the state's economic activity and our members employ approximately one-quarter of the state's private-sector workforce.

Assembly Bill (AB) 604 would create binding arbitration rights to settle disputes between video programmers and multichannel video programming distributors. Under the bill, a video programmer which believes that a multichannel video programming distributor has not treated the programmer in a "fair, reasonable, and nondiscriminatory manner" regarding how much the distributor will pay the programmer for programming may force the distributor into binding arbitration. In such a dispute, the arbitrator would have the power to choose how much the distributor would pay for the addition or renewal of the programming in question.

Sports Fans Are Understandably Upset

As a result of a still-unsettled dispute between cable television providers, such as Time Warner and Charter Communications, and the NFL network, some Wisconsin football fans have not been able to watch, on their cable televisions, all of the games they would like to see. For example, Green Bay Packers fans in some parts of Wisconsin were understandably upset that their cable television provider did not afford them an opportunity to view last fall's game between the Green Bay Packers and the Dallas Cowboys.

Unfortunately, fan frustration has lead some state legislators to believe that the appropriate way to settle this dispute is by state action. As frustrated as sports fans are that this dispute is ongoing, no legitimate state interest is advanced by advancing a legislative remedy for, ultimately, what is a private commercial disagreement.

Sports Fans Have Alternatives

Sports fans, as the NFL Network's "Football 24.7" website points out, have alternatives. In Wisconsin, today, many disgruntled cable television customers can drop their cable subscriptions and, instead, obtain their programming via satellite. The Football 24.7 website contains helpful links to DIRECTV and the Dish Network, satellite television providers which offer the NFL Network.

More Alternatives Forthcoming

In addition to the satellite television providers noted, above, more video services competition is on the way. Governor Doyle, last month, signed Assembly Bill

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(AB) 207 into law, legislation which will foster more competition in the video services market by allowing companies, such as telecommunications company AT&T, to enter into statewide franchise agreements for the provision of video services. This is good news for Wisconsin consumers, and WMC commends the Legislature for passing AB 207 and Governor Doyle for signing it into law.

State Has No Business Meddling in a Private Commercial Dispute

Fundamentally, and the root of WMC's opposition to AB 604, is that the state should not meddle in what is a private commercial dispute. Resolution of this dispute should be left up to the NFL Network and the cable companies. It is up to these companies to negotiate how this programming will be offered and how customers will be charged. WMC sincerely hopes the parties come to an agreement but, as pointed out earlier, alternatives to cable television programming exist and more are forthcoming should the issue *not* be resolved.

Legislation like AB 604 would set a disturbing precedent for government interference in private commercial disputes and negotiations. If AB 604 makes sense, what other private commercial disputes should be settled by binding arbitration, should one party request it? What kind of beer is sold in Miller Park? Which kinds of hotdogs are sold here in Madison at Mallards games? Should Usinger's or Johnsonville brats be sold at Lambeau Field? How Target and WalMart decide to stock their shelves? Where is the endpoint to this rationale?

WMC respectfully urges you to oppose Assembly Bill 604.

Testimony of Professor Ernest A. Young
re State Arbitration Procedures for Program Carriage Disputes

I. Introduction

Good afternoon. My name is Ernest Young, and I am a professor at the Duke University School of Law. I teach Constitutional Law and Federal Courts, and much of my scholarship focuses upon the general area of federal-state relations and, in particular, the preemption of state law by federal statutes. (For a list of publications and presentations, including several dealing with preemption issues, please see the c.v. appended to this written testimony.) My focus today is on the preemption issues raised by proposed legislation providing for arbitration of cable program carriage disputes. I'm grateful for the opportunity to speak with the committee.

My expenses today are being paid by the National Football League, but my views on the matter of preemption arise directly out of my scholarship in the area. My bias, such as it is, is that I believe in state government – that is, I believe that even in an age when most attention is on *federal* regulation, the States retain a critical role to play in addressing matters of public concern.

Three sorts of issues have generally been raised with respect to similar legislation in other states:

- Preemption under the federal Cable Act;
- Implied preemption under the so-called "dormant" Commerce Clause of the Constitution; and
- Free speech and press arguments under the First and Fourteenth Amendments.

I will spend most of my time on the preemption question, as I think it is the argument most worth taking seriously. But I'll touch on the other two issues at the end.

II. Preemption

Preemption is a possibility whenever state and federal officials share regulatory authority over a particular area of life. This concurrent authority is almost *always* present – there are very few areas that are simply off-limits to either state or federal authorities, and in most areas federal and state legislation must co-exist. This is why it's important to evaluate broad claims of federal preemption carefully – it's almost never the case that federal regulation entirely forecloses a state role, and in order to determine what state measures are permitted and which ones are foreclosed, one must carefully read the statutes in question. Justice Stephen Breyer, for example, recently emphasized "the practical importance of preserving local independence, at retail, i.e., by applying pre-emption analysis with care, statute by statute, line by line, in order to determine how best to reconcile a federal statute's language and purpose with federalism's need to preserve state autonomy."[1]

My conclusion, not to hide the ball, is that the proposed state-law arbitration procedure is *not* preempted. That doesn't mean that the FCC could not act in the future

[1] *Egelhoff v. Egelhoff*, 532 U.S. 141, 160 (2001) (Breyer, J., dissenting).

to preempt state remedies. Such action might or might not be within the FCC's authority under the Cable Act. But the essential meaning of concurrent regulatory authority over a given issue is that either federal or state authorities may act (and federal action will prevail in the event of a conflict). This situation prevails in virtually every area of state regulation. Absent federal action, it's perfectly appropriate for the State to step in and regulate in the interests of its citizens.

A. Standards

Federal preemption of state law generally takes one of three forms:

- *Express* preemption mandated by particular provisions in the text of the federal statute;
- *Field* preemption, implied by a pervasive federal regulatory scheme that indicates Congress intended to foreclose state regulation altogether; and
- *Conflict* preemption, where a particular aspect of state law conflicts with or undermines a particular aspect of the federal statutory scheme.

Regardless of the sort of preemption at issue, the ultimate question remains the intent of Congress: Did Congress mean to foreclose state regulation of the kind at issue? And in evaluating Congress's intent, the courts have applied a "presumption against preemption." As the Court said in *Rice v. Santa Fe Elevator Co.*, "we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."[2] Unless Congress's intent to preempt state law is *clear*, in other words, state law is *not* preempted.

B. What the Proposal Does

It is important to be clear about what the proposal advanced by the National Football League does and doesn't do. It is worth emphasizing that many preemption concerns can be addressed through careful drafting rather than requiring categorical rejection of the call for action. With that caveat, this section traces the broad outlines of the NFL's proposal.

Federal law already prohibits a cable operator from discriminating in favor of its affiliates and against independent programmers.[3] The NFL proposal would simply add a new state-law arbitration remedy for violations of that federal principle. That remedy would have several key elements:

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[2] 331 U.S. 218, 230 (1947).

[3] Section 616 of the Cable Act delegated to the FCC authority to make regulations prohibiting discrimination by cable companies against unaffiliated programmers. *See* 47 U.S.C. § 536(a)(3). Exercising that authority, the FCC promulgated the following regulation:

47 C.F.R. § 76.1301. Prohibited Practices.

(c) Discrimination. No multichannel video programming distributor shall engage in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or non-affiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors.

- Availability of arbitration would be triggered by a colorable risk of discrimination arising from the fact that the programmer seeking arbitration offers a channel that competes in the same category as channels owned by cable operators.
- Arbitration would be "baseball style" – that is, each side would have to tender final positions and the arbitrator would choose the one that is most reasonable.
- It would be open to the cable operator to argue that it is not discriminating against the independent programmer, which would mean that there would be no obligation to carry that programmer at any price.

As the third point makes clear, the NFL's proposal is not to create any state-law "must carry" obligation (as the cable companies have argued). It instead simply provides a state forum for resolution of disputes under the pre-existing federal standard.

There is already a *federal* dispute resolution procedure for program carriage disputes, created by the FCC under § 616 of the Cable Act. This is a litigation-based procedure that takes place before an administrative law judge at the FCC. That procedure has seen little use, largely because parties seeking to employ it must demonstrate discrimination as a threshold matter. Because the evidence of discrimination is generally within the control of the cable company, that showing is often impossible to make in advance of discovery. The chief advantage of the proposed state-law remedy over the existing FCC dispute resolution procedure is that the proposal would make discrimination an issue on the merits, and discovery would be available to generate evidence in support of that claim.

The concern has been raised that the proposal would allow *any* channel—no matter how marginal or strange—to compel arbitration. I think that's incorrect for two reasons:

- SB 343, in its current form, says that in order to seek arbitration, a video programmer must "offer[] a video channel that competes in the same programming category as a video channel owned by a multichannel video programming distributor." That means only those programmers who can point to comparable programming already available on and owned by cable operators can seek arbitration. That's a considerably more finite set of programmers than has been suggested.
- The arbitration proposal simply enforces the underlying federal rule against discrimination. A programmer cannot prevail in an arbitration if the cable operator can offer a nondiscriminatory reason for denying coverage. Outside a few mainstream categories like sports or news, cable operators will likely be able to offer nondiscriminatory reasons.

It is worth emphasizing, finally, that the proposal creates no new substantive legal obligations. It represents the most minimalist form of government intervention available – that is, the creation of a forum for the peaceful and efficient resolution of disputes between private parties.

C. Express Preemption

The provision of the Cable Act that bears most obviously on preemption is § 636 on "coordination of federal, state, and local authority."[4] That provision expressly *saves* state police power over matters of "public health, safety, and welfare" as well as "jurisdiction with regard to cable services" so long as state regulation is "consistent with this title." It also expressly *preempts* state law that is "inconsistent with this Act."

Two important things come out of Section 636:

- The Act envisions a considerable role for state law; and
- The limits of state authority have to be determined by figuring out what's "inconsistent with this Act."

In other words, this is a debate about *conflict* preemption; § 636 disavows any attempt to preempt the field, and it preempts only state law provisions inconsistent with some particular aspect of the federal law. It's also worth noting that § 636 was added to the Cable Act just four months *after* the Supreme Court's decision in *Capital Cities Cable, Inc. v. Crisp*,[5] which read the preemptive effect of the Act more broadly. The cable companies rely heavily on *Crisp*, but that case construed a considerably different statute.[6]

The cable companies have argued for a broader view of preemption based on Section 624(f) of the Act.[7] That provision says that "[a]ny Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of

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[4] Section 636 (47 U.S.C. § 556). Coordination of Federal, State, and local authority

(a) Regulation by States, political subdivisions, State and local agencies, and franchising authorities. Nothing in this title shall be construed to affect any authority of any State, political subdivision, or agency thereof, or franchising authority, regarding matters of public health, safety, and welfare, to the extent consistent with the express provisions of this title.

(b) State jurisdiction with regard to cable services. Nothing in this title shall be construed to restrict a State from exercising jurisdiction with regard to cable services consistent with this title.

(c) Preemption. Except as provided in section 637, any provision of law of any State, political subdivision, or agency thereof, or franchising authority, or any provision of any franchise granted by such authority, which is inconsistent with this Act shall be deemed to be preempted and superseded.

[5] 467 U.S. 691 (1984).

[6] Moreover, the state law preempted in *Crisp* actually sought to regulate the *content* of programming carried on the cable network by banning certain forms of advertising.

[7] 47 U.S.C. § 544. Regulation of services, facilities, and equipment

(f) Limitation on regulatory powers of Federal agencies, States, or franchising authorities; exceptions.

(1) Any Federal agency, State, or franchising authority may not impose requirements regarding the provision or content of cable services, except as expressly provided in this title.

(2) Paragraph (1) shall not apply to--

(A) any rule, regulation, or order issued under any Federal law, as such rule, regulation, or order (i) was in effect on September 21, 1983, or (ii) may be amended after such date if the rule, regulation, or order as amended is not inconsistent with the express provisions of this title; and

(B) any rule, regulation, or order under title 17, United States Code.

cable services, except as expressly provided in this title." This seems to set the bar higher for state regulation – such regulation is permissible only if *expressly* allowed in the statute.

There are, however, two major problems with this argument. First, § 624(f) is not a provision about preemption. Section 624(f) applies to the FCC – "any Federal agency" – as well as to state and local governments. That means that if the proposal falls within § 624(f), the FCC can't do it either. But the cable companies haven't said that – in fact, they invoke the FCC's authority to set up a dispute resolution procedure for program carriage disputes as the reason the state can't act.

Second, the D.C. Circuit has already rejected the cable companies' reading of the Act. In the *United Video* case,[8] the court said that the key to § 624(f) "is whether a regulation is content-based or content-neutral." It also said that rules based on who *owns* particular programming are content-neutral for these purposes. That clearly covers the present situation, where the proposal is triggered simply by the cable companies favoring their own programming over independent programmers like NFL Network.

If the proposed legislation is preempted, then, it must be on the ground that it's inconsistent with some other provision of the act, not § 624(f).

D. Field Preemption

Field preemption occurs only where federal regulation is so pervasive that no room remains for state measures. It's hard to resist pointing out the considerable tension between the cable companies' argument that cable television is pervasively regulated at the federal level and their repeated admonition that regulators should "stay out and let the market work." The truth is that the government has already intervened in this area, but in such a way as to leave room for state enforcement procedures.

The cable companies have argued that Congress intended "to occupy the entire field of cable regulation." But this just patently isn't true. The savings provisions of § 636 demonstrate as much – as does the continued exercise of franchising authority by state and local governments every day. A somewhat more plausible argument – but only somewhat – is that Congress meant to preempt all state regulation of *discrimination* by cable networks by legislating comprehensively with respect to that subject in Section 616 of the Act,[9] which concerns "Regulation of carriage agreements." That section delegates

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[8] 890 F.2d 1173 (D.C. Cir. 1989).

[9] 47 U.S.C. § 536. Regulation of carriage agreements

(a) Regulations. Within one year after the date of enactment of this section [enacted Oct. 5, 1992], the Commission shall establish regulations governing program carriage agreements and related practices between cable operators or other multichannel video programming distributors and video programming vendors. Such regulations shall--

(1) include provisions designed to prevent a cable operator or other multichannel video programming distributor from requiring a financial interest in a program service as a condition for carriage on one or more of such operator's systems;

(2) include provisions designed to prohibit a cable operator or other multichannel video programming distributor from coercing a video programming vendor to provide, and from retaliating against such a

authority to the FCC to prohibit discrimination by cable networks on behalf of their own affiliated programmers, and it requires the FCC to set up a procedure for resolving disputes about discrimination. The FCC has done this by promulgating regulations.

One can't infer preemption merely from the fact that Congress has delegated power to the FCC. Nearly every federal regulatory scheme delegates significant powers to federal administrative agencies, and yet field preemption is rare. In fact, the Supreme Court has said that we should be even *more* reluctant to find field preemption when a federal agency is active in a field, because it's relatively easy for the agency to make its intent to preempt particular state regulatory measures clear if the agency wishes to do so.[10]

The most sympathetic version of the cable companies' argument is that by authorizing the FCC to create a dispute resolution procedure, Congress meant for that procedure to be exclusive. But nothing in either the statute or the FCC's regulations *says* that the FCC procedure is exclusive.[11] Field preemption is an uphill battle in light of § 414 of the Communications Act, which says that "Nothing in this Act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this Act are in addition to such remedies."[12] Other provisions in the Communications Act *do* provide for exclusively federal remedies, either at the FCC or in

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vendor for failing to provide, exclusive rights against other multichannel video programming distributors as a condition of carriage on a system;

(3) contain provisions designed to prevent a multichannel video programming distributor from engaging in conduct the effect of which is to unreasonably restrain the ability of an unaffiliated video programming vendor to compete fairly by discriminating in video programming distribution on the basis of affiliation or nonaffiliation of vendors in the selection, terms, or conditions for carriage of video programming provided by such vendors;

(4) provide for expedited review of any complaints made by a video programming vendor pursuant to this section;

(5) provide for appropriate penalties and remedies for violations of this subsection, including carriage; and

(6) provide penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

(b) "Video programming vendor" defined. As used in this section, the term "video programming vendor" means a person engaged in the production, creation, or wholesale distribution of video programming for sale.

[10] *See Hillsborough Cty. v. Automated Med. Labs., Inc.*, 471 U.S. 707, 718 (1985) ("[B]ecause agencies normally address problems in a detailed manner and can speak through a variety of means, including regulations, preambles, interpretive statements, and responses to comments, we can expect that they will make their intentions clear if they intend for their regulations to be exclusive. Thus, if an agency does not speak to the question of pre-emption, we will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt.").

[11] *See* 47 CFR § 76.1302 ("Carriage Agreement Proceedings") (Any video programming vendor or multichannel video programming distributor aggrieved by conduct that it believes constitute a violation of the regulations set forth in this subpart **may** commence an adjudicatory proceeding at the Commission to obtain enforcement of the rules through the filing of a complaint.").

[12] 47 U.S.C. § 414.

federal district court, but the ones at issue here do not. And still other provisions, such as some of the interconnection rules for telephone communications under the 1996 Telecom Act,[13] expressly envision *state* dispute resolution proceedings.

It is important to keep in mind here the basic baseline assumption that state institutions can – and in fact are often *required* to – enforce federal law. The Supreme Court has held that if federal law creates a cause of action and does *not* make federal jurisdiction exclusive, state courts have a right to adjudicate that claim.[14] And the Court has struck down state jurisdictional limitations that prevent the state courts from hearing federal claims.[15]

This proposal is no different. It simply takes the ordinary baseline that state *courts* can enforce federal law one step further, by creating an expedited arbitration process to enforce federal law more efficiently. This is little different than providing alternative dispute resolution procedures, such as mediation, for federal-law claims that are brought in state court. For that to be impermissible, the cable companies would have to show somehow that state dispute resolution conflicted in some specific way with some aspect of the federal right being enforced. But that's *conflict* preemption, not field preemption.

E. Conflict Preemption

Most of the conflict preemption arguments advanced by the cable companies stem from a misunderstanding about what the proposed legislation actually does. As already discussed, this legislation simply provides an efficient mechanism for enforcing what federal law already requires – that is, that cable companies not discriminate against independent programmers in favor of their own affiliates. The proposal is *not* intended to effect any change in the substantive obligations of the cable carriers. There can thus be no substantive inconsistency with federal law.

It's not the case that *any* difference between the federal regulatory scheme and state law must result in preemption. There would be little point to state regulation if it simply had to mirror federal law. The conflict preemption claim must be, instead, that more efficient state remedies for discrimination are itself inconsistent with federal policy. That would be an odd argument, and no support for it is apparent from the statute or the FCC's regulations. The presumption against preemption, moreover, forbids finding preemption in the absence of clear evidence of Congress's intent. If particular aspects of the state remedial scheme create problems, the FCC can easily act to preempt those down the line. Such conflicts, if they do arise, are likely to involve the details of discovery and the like, and they can be worked out in drafting the particular remedies to be provided under state law. These sorts of conflicts are hardly a bar to the overall principle of a state arbitration remedy.

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[13] *See* 47 U.S.C. § 252(b).

[14] *Tafflin v. Levitt*, 493 U.S. 455 (1990). The Communication Act's general provision for federal court jurisdiction in 47 U.S.C. § 401 is *not* exclusive.

[15] *Testa v. Katt*, 330 U.S. 386 (1947).

The last argument that the cable companies generally make is the old standby of *all* preemption claims – that there is a federal interest in one uniform rule to govern everyone nationwide. But this is plainly misplaced here, for several reasons:

- The *substantive* law on discrimination *is* uniform, because the proposal doesn't change it;
- Carriage agreements are generally negotiated on a local or regional basis, so it's hard to see how different state rules would be a problem. Cable companies already have to deal with state and local regulators on a host of franchising issues.
- If there are uncertainties about the optimal enforcement scheme, then the FCC may well prefer to wait and see while the States experiment in this area. That is, after all, what federalism's all about. As Justice Brandeis famously said, the states are the "laboratories of democracy."[16]

Congress plainly could have mandated uniform federal regulation of cable. It didn't, and instead it expressly "saved" various forms of state regulation. That means that uniformity was less important than state autonomy and experimentation on at least some of the issues involved in cable regulation. Generic appeals to uniformity are thus particularly out of place in the cable area.

III. Dormant Commerce Clause

The Commerce Clause not only grants authority to Congress to regulate, but also restricts state regulation to a certain extent. The more important restriction is that states may not discriminate against out-of-staters.[17] But there are also some cases holding that, even when they act neutrally as between in-staters and out-of-staters, states may not impose excessive *burdens* on interstate commerce.[18] These claims, however, almost never win – and for a very good reason: They invite courts to second-guess the policy judgments of state legislatures about when regulation is necessary and when it is overly burdensome.

There is no plausible argument that the proposed state-law arbitration procedure would discriminate against out-of-state business. Quite the contrary, as the proposal requires the entrenched local cable operator – which will often enjoy a longstanding relationship with state and local authorities – to negotiate with independent programmers that may well be based outside the state. Any challenge to the proposed measure must therefore proceed under the "burden" test: "Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly

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[16] *See New State Ice Co. v. Liebman*, 285 U.S. 263, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

[17] *See, e.g., Philadelphia v. New Jersey*, 437 U.S. 617 (1978).

[18] *See, e.g., Kassel v. Consolidated Freightways Corp.*, 450 U.S. 662 (1981).

excessive in relation to the putative local benefits."[19] As this language makes clear, the test incorporates a strong presumption favoring the validity of state regulation.

It is extremely unlikely that the proposed legislation raises any problem under this standard. It is extremely rare for courts to strike down state laws that do not discriminate against out-of-staters. Moreover, as a threshold matter, it is hard to see how providing a state-law dispute resolution procedure, as opposed to a new state substantive requirement, could "burden" commerce; if anything, the dispute resolution procedure is designed to remove impediments to commerce. In any event, courts have recognized the state interest in promoting competition as substantial.[20] The arbitration process, moreover, builds in a process for determining burdens on cable companies; if the burden of carriage is excessive, the operator will prevail in the arbitration.

Finally, it is well established Congress may authorize state regulation that would otherwise violate the dormant Commerce Clause.[21] Federal law arguably authorizes this through the savings clauses in § 636 of the Cable Act. Those clauses probably would not authorize state regulation that actually discriminated against out-of-staters, but they do recognize that a variety of state regulation is permissible. The proposed arbitration process is surely less burdensome with respect to commerce than more substantive forms of regulation, many of which are presupposed in § 636.

IV. First Amendment

It is undeniably true that a cable operator's decisions about what programming to provide implicates rights under the First Amendment (made applicable to state legislation through the Due Process Clause of the Fourteenth Amendment).[22] Just as the cable operator has a right to program the messages of its choice, it also has a free speech right *not* to distribute messages that it does not wish to distribute. This right is not unqualified, however. The key question in resolving the speech issues is whether the regulation in question is *content-based* or *content-neutral*. If the regulation is content-neutral, it is subject to intermediate scrutiny and will be upheld if the regulation

1) furthers an important or substantial governmental interest;
2) that interest is unrelated to suppression of free expression; and
3) the incidental restriction on First Amendment freedoms is no greater than essential to the furtherance of that interest.[23]

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[19] *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970).

[20] *See Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996). The *Time Warner* case held that the governmental interest in promoting competition in cable markets was substantial under the First Amendment's "intermediate scrutiny" test – a test which is almost surely more demanding than the *Pike* test under the dormant Commerce Clause.

[21] *See South-Central Timber Development v. Wunnicke*, 467 U.S. 82 (1984).

[22] *See Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 636 (1994) ("There can be no disagreement on an initial premise: Cable programmers and cable operators engage in and transmit speech, and they are entitled to the protection of the speech and press provisions of the First Amendment.").

[23] *Turner Broadcasting*, 512 U.S. at 662 (citing *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968)).

Here, the D.C. Circuit has already determined in the *Time Warner* case that regulation based on who owns a particular type of programming, for competition reasons, is content-neutral and sufficiently substantial to satisfy *Turner*.[24] *Time Warner* was, if anything, a harder case, because it involved a requirement to carry certain stations in the basic cable tier, not simply the creation of an alternative dispute resolution system.

The key point is that just because a regulation *affects* content doesn't mean that it is *content-based*. General rate regulation, for example, may affect content by making it easier or harder to provide certain sorts of costly programming. The point of the content-neutrality doctrine, however, is to prevent government from suppressing speech on the basis of disagreement with the message. There is nothing like that in the NFL's proposal. Indeed, it is hard to see how a dispute resolution procedure, unaccompanied by any substantive programming requirements, could *ever* be content-based.

Conclusion

It is important that state legislatures not be deterred from legislating in the public interest of their constituents by over-broad arguments about federal preemption. For the past seventy years, the U.S. Supreme Court has read federal regulatory authority under the Constitution extremely broadly, with the result that federal regulation reaches, to some extent, into almost every area of life. But the mere presence of some federal regulation in a field does not ordinarily oust the States of their concurrent jurisdiction to act. That is the case under the Cable Act. Federal regulation in the area is important and must be respected, but significant room remains for both substantive state regulation and, even less problematically, provision of state procedural options like the one considered here.

[24] *Time Warner Entertainment Co. v. FCC*, 93 F.3d 957 (D.C. Cir. 1996).

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Publications

Major Work

Executive Preemption, 102 NW. U. L. REV. ___ (forthcoming Spring 2008)

The Constitution Outside the Constitution, 177 YALE L. J. 408 (2007)

Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption, 95 CALIF. L. REV. ___ (forthcoming Fall 2007)

Just Blowing Smoke? Politics, Doctrine, and the "Federalist Revival" after Gonzales v. Raich, 2005 SUP. CT. REV. 1

The Supreme Court, 2004 Term—Comment: Foreign Law and the Denominator Problem, 119 HARV. L. REV. 148 (2005).

Institutional Settlement in a Globalizing Judicial System, 54 DUKE L. J. 1143 (2005)

Making Federalism Doctrine: Fidelity, Institutional Competence, and Compensating Adjustments, 46 WM. & MARY L. REV. 1733 (2005)

The Rehnquist Court's Two Federalisms, 83 TEXAS L. REV. 1 (2004)

Judicial Activism and Conservative Politics, 73 U. COLO. L. REV. 1139 (2002)

Preserving Member State Autonomy in the European Union: Some Cautionary Tales from American Federalism, 77 N.Y.U. L. REV. 1612 (2002)

Sorting Out the Debate Over Customary International Law, 42 VA. J. INT'L L. 365 (2002)

Federalism and the Double Standard of Judicial Review, 51 DUKE L. J. 77 (2001) (with Lynn Baker)

State Accountability for Violations of Intellectual Property Rights: How To "Fix" Florida Prepaid *(And How Not To)*, 79 TEXAS L. REV. 1037 (2001) (with Mitch Berman & Tony Reese)

Dual Federalism, Concurrent Jurisdiction, and the Foreign Affairs Exception, 69 GEO. WASH. L. REV. 139 (2001)

Two Cheers for Process Federalism, 46 VILL. L. REV. 1349 (2001)

Constitutional Avoidance, Resistance Norms, and the Preservation of Judicial Review, 78 TEXAS L. REV. 1549 (2000)

Alden v. Maine *and the Jurisprudence of Structure*, 41 WM. & MARY L. REV. 1601 (2000)

State Sovereign Immunity and the Future of Federalism, 1999 SUP. CT. REV. 1

Publications (cont.)

Hercules, Herbert, and Amar: The Trouble with Intratextualism, 113 HARV. L. REV. 730 (2000) (with Adrian Vermeule)

Preemption at Sea, 67 GEO. WASH. L. REV. 273 (1999)

Rediscovering Conservatism: Burkean Political Theory & Constitutional Interpretation, 72 N.C. L. REV. 619 (1994)

Shorter Pieces

Toward a Framework Statute for Supranational Adjudication, 57 EMORY L. J. ___ (forthcoming Fall 2007)

Sosa *and the Retail Incorporation of International Law*, 120 HARV. L. REV. F. 28 (2007), http://www.harvardlawreview.org/forum/issues/120/feb07/young.pdf

Federal Suits and General Laws: A Comment on Judge Fletcher's Reading of Sosa v. Alvarez-Machain, 93 VA. L. REV. IN BRIEF 33 (2007), http://www.virginialawreview.org/inbrief/2007/03/22/young.pdf.

Federal Preemption and State Autonomy, in FEDERAL PREEMPTION: LAW, ECONOMICS, POLITICS (Richard Epstein & Michael Greve, eds., 2007).

The Conservative Case for Federalism, 74 GEO. WASH. L. REV. 874 (2006)

Supranational Courts, Presidential Power, and the Medellin *Case*, 18 FEDERAL SENTENCING REPORTER 240 (April 2006) (with Carina Cuellar)

What British Devolutionaries Should Know About American Federalism, in Basil Markesinis & Jorg Fedtke, eds., PATTERNS OF REGIONALISM AND FEDERALISM (2006)

Taming the Most Dangerous Branch: The Scope and Accountability of Executive Power in the United States, in Paul Craig & Adam Tomkins, eds., THE EXECUTIVE AND PUBLIC LAW: POWER AND ACCOUNTABILITY IN COMPARATIVE PERSPECTIVE (2005)

Entries on "Citizen-State Diversity" and "Suits Against a State" in Matthew Spalding & David Forte, eds., THE HERITAGE GUIDE TO THE CONSTITUTION (2005)

It's Just Water: Toward the Normalization of Admiralty, 35 J. MAR. L. & COM. 469 (2004)

Welcome to the Dark Side: Liberals Rediscover Federalism in the Wake of the War on Terror, 69 BROOKLYN L. REV. 1277 (2004)

The Trouble with Global Constitutionalism, 38 TEX. INT'L L. J. 527 (2003)

Who's Afraid of the Twelfth Amendment?, 29 FLA. ST. L. REV. 925 (2001) (w/Sanford Levinson)

The Last Brooding Omnipresence: Erie Railroad Co. v. Tompkins *and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 ST. LOUIS U. L.J. 1349 (1999)

The Virtues of Presidential Weakness: A Comment on Fitts, 43 ST. LOUIS U. L.J. 741 (1999)

Book Reviews

English Constitutionalism circa 2005, or, Some Funny Things Happened After the Revolution, 21 CONST. COMMENTARY 771 (2004) (reviewing ADAM TOMKINS, PUBLIC LAW (2003))

Is the Sky Falling on the Federal Government? State Sovereign Immunity, the Section Five Power, and the Federal Balance, 81 TEXAS L. REV. 1553 (2003) (reviewing JOHN T. NOONAN, NARROWING THE NATION'S POWER: THE SUPREME COURT SIDES WITH THE STATES (2002))

Briefs

Brief of Constitutional and International Law Scholars in Support of Respondent in No. 06-984, *Medellin v. Texas* (U.S. Supreme Court, October Term, 2007).

Brief of the States of Alabama, Montana, Nevada, and New Mexico as Amici Curiae in Support of Respondent in No. AP-75,207, *Ex Parte Jose Ernesto Medellin* (TX Court of Criminal Appeals, October Term 2005)

Brief of Constitutional Law Scholars as Amici Curiae in Support of Respondents in No. 03-1454, *Ashcroft v. Raich* (U.S. Supreme Court, October Term 2004)

Publications (cont.)

Columns

Developments in the Substantive Law—Separation of Powers, TEXAS LAWYER, Dec. 25, 2006, at 28 (comment on *Hamdan v. Rumsfeld*)

Europe's Constitutional Convention: Will The European Union Embrace Federalism? FINDLAW'S WRIT, Feb. 28, 2002, http://writ.news.findlaw.com/commentary/20020228_young.html

The Balance Of Federalism In Unbalanced Times: Should The Supreme Court Reconsider Its Federalism Precedents In Light Of The War On Terrorism? FINDLAW'S WRIT, OCT. 10, 2001 http://writ.news.findlaw.com/commentary/20011010_young.html

Student Work

The Supreme Court, 1991 Term—Leading Cases, 106 HARV. L. REV. 163, 338-47 (1992) (comment on *City of Burlington v. Dague*).

Recent Developments: Regulation of Racist Speech: In re Welfare of R.A.V., 14 HARV. J. LAW & PUB. POL'Y 903 (1991).

Selected Presentations

"The Federal Courts and the International System," Ass'n of American Law Schools, Section on Federal Courts, Annual Meeting, New York, NY, Jan. 5, 2008.

Testimony before the House Committee on Regulated Industries of the Texas Legislature concerning preemption under the federal Cable Act with respect to program carriage disputes, Austin, TX, Dec. 10, 200.

"Preemption and Federal Common Law," Symposium on Separation of Powers as a Safeguard of Federalism, Notre Dame Law School, South Bend, IN, Oct. 19, 2007.

"The Constitutive and Entrenchment Functions of Constitutions," Symposium on "Positive Approaches to Constitutional Law and Theory," University of Pennsylvania Law School, Philadelphia, PA, Feb. 24, 2007.

"Toward a Framework Statute for Supranational Adjudication," Thrower Symposium on Federalism and Intersystemic Governance at Emory Law School, Atlanta, GA, Feb. 23, 2007, and Duke-Harvard Foreign Relations Law Workshop on International Delegations and the U.S. Constitution, Durham, NC, Nov. 18, 2006.

Featured Scholar, Public Broadcasting System Series on "The Supreme Court," Jan. 31 & Feb. 7, 2007 (see http://www.utexas.edu/law/news/2007/012607_pbs.html).

"The Constitution Outside the Constitution," faculty colloquia at Duke Law School (Feb. 1, 2007), University of California, Berkeley (Nov. 8, 2006), and Stanford Law School (Sept. 27, 2006).

"Stalking the Yeti: Protective Jurisdiction, Foreign Affairs Removal, and Complete Preemption," University of California, Berkeley, Symposium in Honor of Paul Mishkin, Berkeley, CA, Oct. 27, 2006.

"Federal Preemption and State Autonomy," American Enterprise Institute, Conference on Federal Preemption of State Law, Washington, D.C., April 27-28, 2006.

"Allocating Remedial Responsibilities Between Domestic and Supranational Courts," Duke Law School, Delegating Sovereignty Workshop, Durham, NC, March 3-4, 2006.

"Institutional Settlement in a Globalizing Judicial System", University of California, Berkeley, Civil Justice Workshop (March 2, 2006), University of Texas/University of Siena, Conference on Sovereignty, Certosa di Pontignano, Italy (May 30-June 1, 2004), and J.B. Moore Society of International Law Annual Symposium, University of Virginia (March 20, 2004).

"Allocating Remedial Responsibilities Between Domestic and Supranational Courts," University of Chicago, Faculty Colloquium, Feb. 16, 2006.

"The Volk of New Jersey?" faculty colloquia at Notre Dame Law School (Feb. 3, 2006) and the University of Alabama (Nov. 17, 2005), and conference on Sovereignty at the University of Texas School of Law (April 14-16, 2005).

"Foreign Law and the Denominator Problem," Harvard Law School, Harvard Law Review Supreme Court Issue Forum, Cambridge, MA, Nov. 17, 2005.

Selected Presentations (cont.)

"The Conservative Case for Federalism," George Washington University Law School, Symposium on "The Legacy of the Rehnquist Court," Washington, D.C., Oct. 27, 2005.

"Developments in Preemption," Nat'l Ass'n of Attorneys General, Summer Meeting, Big Sky, MT, June 21, 2005.

Commentary on paper by Justice Stephen Breyer, Harvard Law School, Constitutional Law Conference, Cambridge, MA, April 9, 2005.

"Taking Underenforcement Seriously," University of Texas School of Law, Book Symposium in Honor of Larry Sager, Austin, TX, March 4, 2005.

"Making Federalism Doctrine," faculty colloquia at Harvard Law School (Dec. 2, 2004), Columbia Law School (Nov. 18, 2004), University of Michigan (Nov. 12, 2004), and UCLA (Oct. 17, 2003).

Panel discussion, "Packing the Courts? A Discussion of President Bush's Nominations to the Federal Judiciary," American Constitution Society, University of Texas School of Law, Austin, TX, Oct. 29, 2004.

Panel discussion, "Complementary or Contradictory? International Law in the U.S. Courts," Ninth Circuit Judicial Conference, Monterey, CA, July 21, 2004.

Conference of Chief Justices, Annual Meeting, panel on Review of State Court Decisions by International Trade Tribunals, San Francisco, CA, Jan. 21, 2004.

Federalist Society, Faculty Section, Panel on "Foreign Law in U.S. Courts," Atlanta, GA, Jan. 3, 2004.

University College, London, Institute of Global Law, Conference on "Patterns of Federalism and Regionalism," London, U.K., Nov. 7, 2003,

UCLA Faculty Colloquium, "Making Federalism Doctrine," Los Angeles, CA,.

University of Texas CLE, Conference on "Administrative Law in Texas," Austin, TX, July 31, 2003.

"'The Ordinary Diet of the Law': Federal Preemption and State Autonomy," Harvard Law School, Faculty Colloquium, Cambridge, MA, Feb. 14, 2003.

"Why the Federal Common Law of Admiralty is Unconstitutional, and Why Maritime Lawyers Ought to Care," University of Texas CLE, 11th Annual Admiralty & Maritime Law Conference, Houston, TX, Oct. 18, 2002.

Oxford/NYU Institute, Workshop on "Regulating Transnational Markets: Between State Sovereignty, Integrated Markets and Transnational Communities," NYU School of Law, Sept. 19-20, 2002.

"The Trouble with Global Constitutionalism," University of Texas School of Law, Symposium on Judicialization and Globalization of the Judiciary, Austin, TX, Sept. 5-6, 2002.

"Preserving Member-State Autonomy in the European Union: Some Cautionary Tales from American Federalism," University of Siena, Siena, Italy, May 2002.

"Judicial Activism and Conservative Politics," Federalist Society, Faculty Section, New Orleans, LA (January 2002) and University of Colorado School of Law, Ira C. Rothgerber Symposium (Oct. 2001).

Panel discussion, "Supreme Court 2000-2001: The Term in Review," Federal Judicial Center, Washington, D.C., July 2001.

"Preserving Member-State Autonomy in the European Union: Some Cautionary Tales from American Federalism," UT/Oxford University Exchange Program, Oxford, U.K., June 2001.

"Who's Afraid of the Twelfth Amendment?" Florida State University College of Law, Symposium on The Law of Presidential Elections, Tallahassee, FL, March 2001.

"Drafting with Preemption in Mind," National Conference of State Legislatures, Senior Legislative Drafting Seminar, Austin, TX, November 2000.

Conference on Intellectual Property and State Sovereign Immunity, United States Patent & Trademark Office, Washington, D.C., March 2000.

Selected Presentations (cont.)

"Hercules, Herbert, & Amar: The Trouble with *Intratextualism*," University of Chicago Law School, Faculty Colloquium, Chicago, IL, July 1999.

"The Last Brooding Omnipresence," Association of American Law Schools, Maritime Law Section, Panel on Federal Common Law in Admiralty, Washington, D.C., Jan. 1999.

Other Activities

Institutional Service

Judicial Clerkship Advisor, 1999-present

Chair-elect, Federal Courts Section, Association of American Law Schools, 2007

Co-Director, Emerging Scholars Program, 2005-06

Faculty Advisor: Texas Law Review, 2001-present • McCormick Student Society, 2005-06 • Plan II Pre-Law Society, 2000-02

Committees: Dean Search, 2006 • Long Range Planning, 2001-02 • Tenure (Chair) 2003-04 • Appointments, 2000-01, 02-03, 05-06 • Admissions, 1999-2000 • Parental Leave, 1999-2000

John R. Brown Admiralty Moot Court Competition Committee, 1999-present

Chair, Maritime Section of the Association of American Law Schools, 2003-2004

Consulting Federal Litigation and Jurisdiction • Preemption of State Law • Constitutional Law • Administrative Law • Supreme Court and Appellate Litigation • Foreign Affairs Law

Bar Admissions Texas (1994) • District of Columbia (1996; inactive) • U.S. Supreme Court • Federal Circuit • Third Circuit • Fifth Circuit • Seventh Circuit • Ninth Circuit • Northern District of Texas

Personal Married to Allegra Jordan Young, Harvard MBA 1995, a marketing consultant with I & O Consulting in Austin, TX • father of Alex (12 yrs) and Michael (9 yrs)

References

Douglas Laycock, Professor of Law, University of Michigan Law School, 412 Hutchins Hall, Ann Arbor, MI 48109-1215, laycockd@umich.edu

Sanford Levinson, W. St. John Garwood and W. St. John Garwood, Jr. Centennial Chair, University of Texas School of Law, 727 E. Dean Keeton St., Austin, TX 78705, slevinson@law.utexas.edu

Daniel J. Meltzer, Story Professor of Law, Harvard Law School, 331 Areeda Hall, 1545 Massachusetts Ave., Cambridge, MA 02138, dmeltzer@law.harvard.edu

Michael Boudin, Chief Judge, U.S. Court of Appeals for the First Circuit, Ste. 7701, John Joseph Moakley U.S. Courthouse, 1 Courthouse Way, Boston, MA 02210, 617.748.4431.

David H. Souter, Associate Justice, United States Supreme Court, 1 First St., N.E., Washington, D.C. 20543, 202.479.3000.

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Amy Boyer

From: Robert Fassbender [fassbender@hamilton-consulting.com]
Sent: Tuesday, January 22, 2008 9:55 AM
To: boyer@hamilton-consulting.com
Subject: Nuclear Power Bills

Is someone from Xcel monitoring these nuke bills; if not, could you send a note to Dave on the vote (I see no reason to attend). Thanks.

Bob Fassbender
The Hamilton Consulting Group
fassbender@hamilton-consulting.com
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Assembly
EXECUTIVE SESSION
Committee on Energy and Utilities

The committee will hold an executive session on the following items at the time specified below:

Tuesday, January 22, 2008
10:00 AM
412 East
State Capitol

Assembly Bill 223

Relating to: excluding Internet access services from the definition of telecommunications services for sales and use tax purposes.

By Representatives Zipperer, Kramer, Albers, Ballweg, Gundrum, Kerkman, F. Lasee, LeMahieu, Lothian, Molepske, Moulton, Nass, Nygren, Petrowski, Pridemore, Roth, Strachota, Suder, Van Roy, Vos, Vukmir, Ziegelbauer and Davis; cosponsored by Senators Leibham, Kanavas, Darling, Grothman, Kedzie, Olsen, Plale and Schultz.

Assembly Bill 346

Relating to: repealing the limits on the construction of nuclear power plants.

By Joint Legislative Council.

Assembly Bill 347

Relating to: requiring the Public Service Commission to investigate future electric supplies after the operating licenses of nuclear power plants in the state expire.

By Joint Legislative Council.

Assembly Bill 348

Relating to: requiring the Public Service Commission to advocate on matters related to the centralized interim storage of, and any license application for, a federal repository for high-level radioactive waste and transuranic waste and requiring nuclear power plant owners and operators to provide information required by the Public Service Commission.

By Joint Legislative Council.

Assembly Bill 515

Relating to: the regulation of certain suppliers of liquefied petroleum gas, applicability of the statewide system for notification of the location of transmission facilities, granting rule-making authority, and providing a penalty.

By Representatives Bies, Ballweg, Boyle, Davis, Hahn, Kerkman, LeMahieu, Molepske, Montgomery, Mursau, Nerison, Nygren, A. Ott, Petersen, Shilling, Tauchen, Zepnick and Petrowski; cosponsored by Senators A. Lasee, Plale, Hansen, Kapanke and Schultz.

A public hearing will immediately follow the executive session.
1/17/2008: Assembly Bill 560 was removed from the list of items to be heard.